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THE NEW YORK CODE.

We have been intending for a long time to notice the New York Code, so called. But, at the outset, we have been met by an obstacle, which has seriously interfered with a careful examination of the subject. This is the irregular manner in which the public have been permitted to get glimpses of the new "*corpus juris.*" For this, neither the commissioners, nor the friends of legal reform, are in any degree responsible. On the contrary, it is only one of numerous instances in which the enemies of a great measure have contrived to thwart and embarrass a movement, which they could not prevent. On account of these inimical attempts, the commissioners have been compelled to report before they were prepared; the different parts have been carelessly put together by the legislature; the legislation on the subject has been immediately revised, until at last, what has been sneeringly called by its enemies the "*newest new code,*" has made its appearance. In consequence, that which should have been a compact and symmetrical digest of law is, after all, a "little patched up," to use a homely expression, and lacks that entireness which was of all things most desirable. But at the same time, nothing proves more conclusively the sincerity and disinterestedness of the commissioners, than the firmness

with which they have adhered to their purpose, in spite of the most mortifying rebuffs and misrepresentations; and, although all must admit that they were the very men who would have been most sensitive in regard to any mutilation of this work, yet they have waived all personal feeling, until they have been able to publish the two volumes (so we may call them) containing the civil and criminal codes.[1]

After all, this repugnance to any innovation is not to be wondered at. Of all men, lawyers are most strongly opposed to experiments. And the public generally share in this feeling, so far as the law is concerned. In medicine, every new system of practice finds hundreds of devoted believers, not only among the ignorant, but among the educated also. And any one who notices the vacillations in the rules of medical treatment, which at different periods are recommended by practitioners of the highest authority, may well doubt the virtue of the medical art. And, with reverence be it spoken, it is also clear that, in all matters pertaining to religion, popular credulity may be imposed upon to an unlimited extent. But in the great garden of the law, "Confidence is a plant of slow growth." It has been thought, that, in America, the Vandal spirit of reform was invading the province of jurisprudence, and that the law, like everything else, would suffer from the recklessness of our republicanism. But is this so? Is it not true, that the respect of the Americans for law, — their loyalty, to use a more expressive term, is equal to that of any nation? Our legislators talk and wrangle, yet how rarely do they disturb any of the principles of jurisprudence, and certainly, nowhere is there less disposition to interfere with the proceedings of the courts. The extreme radicalism of America has resulted in an excessive conservatism upon this one point, — in a strong desire to uphold what seems

[1] The Code of Civil Procedure of the State of New York. Reported complete by the Commissioners on Practice and Pleadings.

The Code of Criminal Procedure of the State of New York. Reported complete by the Commissioners on Practice and Pleadings.

to be the only permanent institution in this grand age of progress.

Yet it is most gratifying to notice that, notwithstanding so strong a conservative influence in favor of the institutions of the law, there is a willingness to submit to a wholesome change. The extent and character of the change may occasion discussion, but we think that we have now reached that period in American history, in which all must admit that the system of English law which has generally obtained in the United States requires change, — in other words, it needs *Americanizing*. The Americans are in a large measure of English extraction. They have adopted their language, and many of their principles and customs. But it by no means follows that because, for lack of time to mature a better system, we have so readily adopted the jurisprudence of Westminster Hall, we are to be forever tied down to its precedents; and that the rules of conduct which have been developed by the necessities of the artificial society of England, will suffice for a great republic, rejoicing in the vigor of the free principle, and already controlling the civilization of the world. There is much in the common law which recommends it, but there is also much which is at variance with American civilization. The common law, like the English nation, is of both Saxon and Norman origin, and it betrays, in its details, the different qualities of these two continental races. But such is not the composition of the American nation, and such should not be the only prominent features of American jurisprudence. The republican institutions of America naturally tend to revive with vigor those principles of Saxon law which sustain to the utmost the rights of the individual. Such are the trial by jury, the allodial tenures, and, to a limited degree, the law of evidence. On the other hand, so much of the English law as is referable to the Feudal System, and to the fantastic habits of the age of chivalry, is sadly at variance with the utilitarian character of the present age. But the Saxon swineherds would have trembled at the restless spirit of commercial enterprise

which characterizes America, and the Saxon laws correspond no better with American necessities, than would the hall of Rotherwood with a New Yorker's idea of luxury. An American jurist, therefore, who would profit by the light of experience, naturally abandons many of the old English landmarks, and seeks for assistance, in the civilization of our law, from that system which is called pre-eminently the Civil Law.

Such, we think, must be admitted by every candid observer, to be the true tendency of things in this country. We are not a nation of landholders quarrelling about the artificial rights established by a series of *subinfeudations*; and, by consequence, the importance of the law of real property, is here greatly diminished, owing to the extent and complication of our commercial transactions. This gives additional importance to those principles of personal right which are best set forth in the jurisprudence of ancient Rome, and which mark an age of great refinement as well as freedom of opinion.

The great national characteristics of America are, of course, to be found in the institutions of all its States. Yet, in the discrepancy which must be admitted to exist in their laws and customs, a careless observer must be at a loss for the type of the American character. We are free to say, however, notwithstanding all local affinities, that the state of New York must be recognized as the truest type of the American state. Whether, because, on account of its size, it controls every national movement, or because of its commercial advantages, the commercial pulsations are regulated by what constitutes in fact the heart of the whole system, it is certainly true that in commercial enterprise, in political affairs, and in jurisprudence, the policy of New York has been always found consistent with the general policy of the Union. Perhaps it leads. Perhaps "it seems to lead because it is always sure to follow;" but it almost always happens that the policy and purpose of New York recommends itself to the American people.

In view of all these considerations, any radical movement

in New York, on the subject of jurisprudence, is naturally watched with great anxiety, and the triumph or failure of the experiment in that State is thought to be conclusive as to the success of the experiment elsewhere. If any one doubts as to this point, let him note how the jurisprudential policy of New York is now controlling that of Massachusetts, Missouri, Mississippi, Wisconsin, and California, and probably also that of Ohio. Such a movement in most other States would have attracted little general notice, but in New York, with a consciousness of great power, there seems also to have existed a great sense of responsibility, and from the outset, every project of reform has been most stoutly resisted by all who wished things to remain as they were. But it now seems to be most conclusively settled, that the fundamental change which has been suggested in New York, is to result in a new system of practice in that state, and probably throughout the Union. We therefore propose to give briefly a history of this movement, and then to state the principal features of the codes, reserving to a future number such a reference to their details as should seem to be proper.

The first step towards revolution in the law, in New York, appears to have been taken in 1842, when one of the members of the present commission submitted to the legislature, through a member of the assembly, three bills; the first, "for the more simple and speedy administration of justice, in the courts of common law;" the second, "for the more simple and speedy administration of justice in courts of equity;" and the third "to simplify indictments." These were accompanied by a letter at great length, setting forth and sustaining the principles of the bills. This movement was attended with no farther success than to attract public attention to the subject, a result to which the publication of the bill and letter, in an appendix to the report of the committee on the judiciary, greatly contributed. Under the old constitution of New York, the amalgamation of law and equity procedure was impracticable; and, therefore, nothing of the kind was attempted.

An abolition of the forms of action was however contemplated, and a reduction of the previous system of pleading to a complaint, and answer verified by affidavit. Indeed, the verification of pleadings was one of the principal points aimed at. But the profession and the legislature were opposed to this, and so long as the constitution remained unaltered, "Law Reform" seemed impracticable.

But the new constitution rendered great changes necessary. It renovated the courts, uniting the administration of law and equity, prescribed new rules as to evidence, and finally directed that the next legislature should provide for the appointment of three commissioners, "whose duty it shall be to revise, reform, simplify, and abridge, the rules and practice, pleadings, forms and proceedings of the courts of record." This opportunity was embraced by the gentleman before referred to, to enforce his views in a series of questions addressed to lawyers, which were published in a pamphlet form.[1] This pamphlet took the ground, that a uniform course of pleading, in all cases of legal and equitable cognizance, was practicable and desirable, and pointed out the method for securing a uniform mode of trial in all cases, and the subordinate changes required, to render the remaining proceedings in a cause, simple, and, as far as possible, uniform. The pamphlet was generally read, and we are indebted to it for a memorial of the Bar, which caused a provision to be inserted in the Act for the appointment of Commissioners, which made it their *duty* "to provide for the abolition of the present forms of actions and pleadings in cases at common law, for an uniform course of proceeding in all cases, whether of legal or equitable cognizance, and for the abandonment of every form and proceeding, not necessary to ascertain or preserve the rights of the parties."

We have taken pains to give the history of the origin of the New York movement, because it seemed to be due to the gentleman who led it, and who has adhered to his purpose, in spite of the most discouraging obstacles.

[1] What shall be done with the Practice of the Courts? Shall it be wholly reformed? Questions addressed to lawyers, by DAVID DUDLEY FIELD, New York, 1847.

The Civil Code is divided into four parts: the first relates to the courts of justice; the second to civil actions; the third to special proceedings of a civil nature; the fourth to evidence. It is to be noticed, that, of the three commissioners engaged in its preparation, Mr. Loomis, Mr. Graham, and Mr. Field, the second dissented from the introduction of the fourth part. With that exception, the commissioners unanimously agreed upon the division of the code, as above. The object of the code is to establish a fundamental law of the State. It therefore provides, in the outset, that the familiar rule of the common law, that statutes, in derogation thereof, are to be strictly construed, has no application. All its provisions, and all proceedings under it, are to be liberally construed, with a view to promote its objects, and to assist parties in obtaining justice. It is to be, of itself, the *common law* of New York. This being settled, it becomes essential to introduce many definitions and propositions, which seem like threadbare truisms, but which are very accurately and clearly stated. The introduction of these, has given to enemies a new opportunity for ill natured raillery, but all candid readers must notice that the course of the commissioners, in this respect, is neither supererogatory nor injudicious.

This being the general object of the Civil Code, we would briefly notice its four grand divisions. The first, (in regard to courts of justice,) has more especial reference to the organization and jurisdiction of the courts; to the tenure of judicial office; the functions of judicial officers; the functions of persons specially invested with powers of a judicial nature, such as jurors, referees and commissioners; the functions of the ministerial officers of the court. In general, it may be said, that this division does not materially change the course of the common law, although it reduces to a simple and compact form much which was previously well understood, but most loosely defined, either by statute or decision. In one respect, however, a very important new feature is introduced. We refer to the Courts of Conciliation, provided for in Pt. I., Tit. I. ch. XV., in Pt. III.,

Tit. VII. It is specially provided that, in certain enumerated cases, chiefly cases sounding in *tort*, any person claiming to have a cause of action against another, may compel his appearance before the Court of Conciliation, where a hearing shall be had in private, and a settlement may be made with consent of parties, of which the terms need not be specified, but which shall finally determine the matter in controversy. We speak from experience, and after having resided under the Danish jurisdiction, and in the vicinity of courts of this sort, when we bear willing testimony to their efficacy, and their most salutary influence.

The second division of the Civil Code treats of civil actions. The distinguishing feature of this division, is the reduction of all legal proceedings to a simple complaint and answer, and the requiring of a verification for all pleadings. Of its many details, in regard to the form and time of commencing civil actions, of parties, place of trial, pleadings, provisional remedies, trial, judgment, execution, costs, appeals, &c., we have no room now to speak. We can only say, that all these points have been most maturely considered, and clearly stated.

The third division treats of special proceedings, such as State writs, (*mandamus*, *habeas corpus*, &c., called in the code, writs of mandate and deliverance,) summary proceedings, liens, arbitration, probate, insolvency, dower, partition, conciliation, assessment of damages, and the like.

The fourth division treats of evidence, its general principles, kinds and degrees, the rules in regard to its production and effect, the rights and duties of witnesses. The commissioners, or rather the majority of them, have adopted, in this branch of their duty, a bold and sweeping line of reform, materially changing the old course of proceeding. Parties to actions, persons interested, persons infamous, and atheists, may and must be witnesses. Their credibility may be assailed, but their competency cannot be questioned. In fact, the only persons who are either excused or excluded, are children, persons of unsound mind, and those standing in such peculiar relations to parties that it is

the policy of the law to encourage confidence, such as clergymen, physicians, attorneys, public officers, and a husband or wife in certain contingencies. In regard to these great changes, the profession are very much divided, and we are loath, at present, to express any opinion on the vexed question.

The Criminal Code may, perhaps, be said not to have so materially changed the criminal law of the State, as it before existed. It is divided into seven parts, relating to courts of criminal jurisdiction, judicial proceedings for the removal of public officers, proceedings upon indictments, proceedings in police courts, special proceedings of a criminal nature, and costs. The preliminary chapter contains well expressed divisions and definitions of offences, and an enunciation of rights which are secured to every individual as against the government, such as that no person shall be a second time tried for the same offence, or compelled to testify against himself, and the like. But we have been unable to examine the Criminal Code as critically as we desired, and are unable to speak clearly of its provisions. The simplification of the practice appears to have been a great object with the commissioners, and they appear to have labored zealously to secure to the cause of public justice, that certainty which has so frequently been prevented by the observance of useless forms and unmeaning technicalities. That this is a difficult and dangerous task, the commissioners fully admit. They admit also the strong necessity, in proceedings of a criminal nature, of protecting to the utmost the rights of the citizen, and therefore, although they have approached their task with firmness, they have manifested throughout an extreme diffidence and delicacy.

To many of the provisions of the two codes, particularly to that portion of the Civil Code, which treats of evidence, we hope to recur. It will affect the common relations of life more materially than any legislation about which politicians have wrangled for years. Its effect must be immediate, certain, permanent, and, we cannot but hope, beneficial.

If the new codes shall finally be adopted as the law of New York, the experiment will be watched with anxious interest throughout the Union, and upon its success or failure, the jurisprudential policy of each separate State will undoubtedly, in a great measure, depend.

LORD CAMPBELL.

We subjoin a report of the address delivered by Lord Campbell on the occasion of leaving the Society of Lincoln's Inn, where the ceremony of what is called "ringing out" was performed on Wednesday, the 6th of March. That address of course referred to his eminent predecessor.

"Lord Campbell was on Wednesday sworn in a Serjeant-at-Law and Lord Chief Justice of England, in the Lord Chancellor's private room at the House of Lords. Mr. Justice Coleridge and Mr. Justice Wightman were present; and the noble Lord, after the ceremony, received the congratulations of his friends. The ceremony took place shortly before five o'clock. The following address, by Lord Brougham, and answer by the new Lord Chief Justice, were delivered at Lincoln's Inn, upon the latter noble and learned lord taking leave of that society, in order to become a member of Serjeant's Inn: —

"Lord Brougham. — 'It is a painful occasion for us, Lord Campbell, on your quitting our society, to sever a tie which has, for nearly a quarter of a century, knit us together. But under this serious loss, we have the satisfaction of knowing that you do not leave this for another respectable and learned society, (though not more respectable or learned than ours,) there to remain. You will speedily be called to fill the highest place among the judges of the land — the Common Law judges — by the favor of the crown, with the full assent of our common profession. The arduous nature of the duties which will thus devolve upon

you I need not stop to remark, — arduous in the proportion of their incalculable importance to your country — I may say to the world, considering the exalted position which British justice holds in the estimation of all mankind. But I may note the great augmentation which the difficulties of your new situation receive from the merits of the great magistrate whom you succeed, and whose retirement, to the sorrow of all the profession and all the community, has been occasioned by the failure of his bodily health. This topic was well handled, on a like occasion, by him whom all of us, his successors in the Great Seal, have ever regarded and revered as the founder of equity in this country — Lord Nottingham — on the retirement of Lord Hale from the seat of justice. But I will not dwell on this subject, well aware that in following that eminent man's argument I should fall so far short of it. Of him whom you succeed, however, I may be permitted to say that no judge ever brought to his high office a greater natural capacity, more improved by diligent and enlarged study — that none ever exercised their judicial functions with more sagacity, more industry, greater patience, greater courtesy to all — an impartiality more absolute, a desire to get at the truth and the right more unremitting; in fine, a more constant and inflexible love of justice — the first of qualities in a judge. To these official virtues of your illustrious predecessor, must be added the private and personal qualities by which he won the affections and commanded the respect of all, and attracted their admiration, as well in public as in private life. To him I may surely apply the words of the renowned Roman orator, spoken of his friend and brother jurisconsult: — 'Erant in eo plurimæ literæ, nec eæ vulgares, sed interiores quædam et reconditæ, divina memoria, summa verborum et gravitas et elegantia; atque hæc omnia vitæ decorabant dignitas et integritas. Plena senectutis literatæ oratio. Quanta severitas in vultu! Quantum ponderis in verbis! Sileamus de isto ne augeamus dolorem.'

"Lord Campbell. — 'It is to me the highest gratification

to have been addressed by one who has so long been the distinguished ornament of our common profession, and to whom, for so many years, I have been indebted for constant acts of kindness and friendship. Truly has he represented the arduous nature of the duties I am called to discharge, and their increase by the high merits of him to whom I succeed. In every one word of the eulogy just pronounced on that great judge I cordially concur; and it will be my constant endeavor to set his bright example before my eyes, in the hope of following him, though at a distance. The difficulties of my position will be greatly relieved by the known learning and talents of my much esteemed brethren on the bench, with whom I have the happiness of living on the most cordial terms of friendship; and also by the learning and talents of the enlightened bar, whose aid I shall, I trust, have the happiness to possess. The moment of quitting this society is no doubt a painful one; and I never can forget those happy hours which I have passed in the company of those whom I see around us, and whose full attendance on the present occasion I regard as a most valuable testimony to their having not been displeased with our intercourse. I respectfully take my leave of you.'

"Lord Brougham added, that he had, in the agitation of the moment, omitted to mention that Lord Campbell's having quitted the bar for some years formed no objection to his present promotion: for he (Lord Brougham) was bound in gratitude, and in strict justice, to state, that during those years Lord Campbell had labored unremittingly in the High Courts of Appeal, and had thus been not out of the profession, but inured, by practice, to judicial habits."

Recent English Decisions.

Court of Exchequer. — Hilary Term. — Jan. 22.

Bird *v.* Brown.

RATIFICATION — STOPPAGE IN TRANSITU.

The maxim, "Omnis ratihabitio retrotrahitur et mandato priori æquiparatur," means: First, as applied to cases of contract, that if A., unauthorized by B., makes a contract on his behalf with C., which B. afterwards recognizes and adopts, the contract is to be dealt with as having been originally made by his authority; Secondly, as applied to cases of tort, that where A., professing to act by the authority of B., does that which *primâ facie* amounts to a trespass, and B. afterwards assents to and adopts his act, A. is treated as having from the beginning acted by his authority, and B. becomes a trespasser unless he can justify the act. In some cases, also, that where an act, which if unauthorized would amount to a trespass, has been done in the name and on behalf of another, and without previous authority, a subsequent ratification may enable the party on whose behalf the act was done to take advantage of it, and treat it as having been done by his direction: but this doctrine must be taken with the qualification, that the act of ratification must take place at a time and under circumstances when the ratifying party might have himself lawfully done the act which he ratifies.

A., a merchant at Liverpool, sent orders to B. at New York to purchase certain goods; which were shipped accordingly, in five ships, and consigned to A., who, after the receipt of the goods by one of them, stopped payment on the 7th April, 1846. B., pursuant to directions from A., had drawn bills for the goods partly on A. and partly on C., with whom A. had dealings. D., a merchant at Liverpool, and who also had a house of business at New York, purchased there several of the bills, which were drawn at sixty days' sight, and dated some on the 28th, and others on the 30th March, 1846. On the 8th May a fiat in bankruptcy issued against A., and his assignees were appointed. The other four vessels arrived respectively on the 4th, 5th, 7th, and 10th of that month, and immediately on the arrival of each, and while the transitus of the goods on board continued, D. on behalf of B., but not being his agent, and without any authority from him, gave notice to the masters and consignees, claiming to stop the goods in transitu. On the 11th May the assignees made a formal demand of the goods still on board and undelivered, from the master and consignees of each of the four ships, at the same time tendering the freight; but they refused to deliver them, and on the same day delivered the whole to D. On the next day the assignees made a formal demand of the goods from him, but he refused to deliver them up. On the 28th April, B. heard at New York that A. had stopped payment, and on the next day he executed a power of attorney to E. of Liverpool, authorizing him to stop the goods in transitu. This was received by E. on the 13th May, who on that day adopted and confirmed the previous stoppage by D. B. afterwards adopted and ratified all which had been done both by E.

and D. *Held*, that the title of A. to the goods was not divested by the above stoppages in transitu, and consequently that trover for them was maintainable by the assignees against B.

THIS was a special case, which was argued in Michaelmas Term, before Pollock, C. B., Parke, Alderson, and Rolfe, BB., by

Cowling, for the plaintiffs, and
Crompton, for the defendants.

The following authorities were referred to. 4 Inst. 317; Abb. Ship. 490; Story on Agency, § 242–246; H. 7, H. 4, 34, pl. 1; 3 Co. 29 b.; *Lord Audley's Case*, (Cro. Eliz. 561; also reported in Moore, 457, pl. 630, nom. *Lord Awdely's case;* and Poph. 108, pl. 2, nom. *Pollard* v. *Luttrell*); *Waring* v. *Dewberry*, (1 Str. 97); *Fitchet* v. *Adams*, (2 Str. 1128); *Right* d. *Fisher* v. *Cuthell*, (5 East, 491); *Siffken* v. *Wray*, (6 East, 371); *Solomons* v. *Dawes*, (1 Esp. 83); *Coore* v. *Callaway*, (Id. 115); *Northey* v. *Field*, (2 Esp. 613); *Goodland* v. *Blewith*, (1 Camp. 476); *Hagedorn* v. *Oliverson*, (2 Man. & S. 485); *Rowe* v. *Pickford*, (8 Taunt. 83); *Hull* v. *Pickersgill*, (1 Br. & B. 282); *Maclean* v. *Dunn*, (4 Bing. 722); *Nicholls* v. *Le Feuvre*, (2 Bing. N. C. 81); *Jackson* v. *Nicholl*, (5 Bing. N. C. 508); *Goodtitle* d. *King* v. *Woodward*, (3 B. & Al. 689); *Bailey* v. *Culverwell*, (8 B. & Cr. 448); *Clay* v. *Harrison*, (10 B. & Cr. 99); *Doe* d. *Mann* v. *Walters*, (Id. 626); *Wilson* v. *Barker*, (4 B. & Ad. 614); *Whitehead* v. *Taylor*, (10 Ad. & El. 210); *Wilson* v. *Tummun*, (6 Man. & G. 236, and note, p. 239); *Whitehead* v. *Anderson*, (9 M. & W. 526); and *Buron* v. *Denman*, (2 Exch. 167). *Cur adv. vult.*

The judgment of the Court was now delivered by

POLLOCK, C. B. — This was an action of trover, to recover the value of several cargoes of corn and other goods sent from New York to this country.

It was tried at Liverpool, and a verdict was found for the plaintiffs, subject to our opinion on a case reserved. The case was argued before us last term, when the material

facts appeared to be as follows: — Carne & Telo, merchants at Liverpool, early in 1846 sent out extensive orders to Charles Illins, a merchant at New York, to purchase for them corn, flour, tallow, and other articles.

In pursuance of these orders, Illins made purchases to the amount of about 1400*l.*, and shipped the goods by five vessels bound to Liverpool, namely, two vessels, each called "The Ashburton," and three others, called respectively "The Europe," "The New York," and "The Hottinguer." These were all general vessels, and the goods were consigned to Messrs. Carne & Telo.

The shipments were all made in the month of March. 1846. The goods shipped by the Hottinguer were received by Carne & Telo before the 7th April, 1846, on which day they stopped payment. Illins, pursuant to directions from Carne & Telo, had drawn bills for the goods. partly on Carne & Telo themselves, and partly on a firm of Richards, Little & Co., with whom Carne & Telo had dealings. The defendants, who are merchants at Liverpool, and who also have a house of business at New York, purchased there several of the bills so drawn by Illins, to the amount of 7000*l.*, and those bills were remitted in regular course to them at Liverpool. The bills were all drawn at sixty days' sight, and were dated, some on the 28th March, the rest on the 30th.

On the 8th May a fiat in bankruptcy issued against Carne & Telo, and they were duly found bankrupts, and the plaintiffs are their assignees. The Europe arrived at Liverpool on the 4th May, one of The Ashburtons on the 5th, the other on the 7th, and The New York on the 9th; and immediately on the arrival of each of these ships, and while the transitus of the goods on board continued, the defendants, on behalf of Illins, gave notice to the master and consignees of each ship, claiming to stop the goods in transitu. The defendants were not agents of Illins, nor had they received from him any authority to make this stoppage. On the 11th May, the plaintiff Bird, as official assignee of Carne & Telo, made a formal demand of the

goods from the master and consignees of each of the four ships, at the same time tendering the freight; the goods were then still on board undelivered, but the masters and consignees refused to deliver the goods to the plaintiffs, and on the same day delivered the whole of them to the defendants. On the next day, the plaintiff Bird made a formal demand of the goods from the defendants, but they refused to deliver up the same, claiming title under the stoppage in transitu.

On the 28th April, Illins heard at New York that Carne & Telo had stopped payment; and on the next day he executed a power of attorney to Joseph Hubback of Liverpool, authorizing him to stop the goods in transitu. This was received by Hubback on the 13th May, and he on that day adopted and confirmed the previous stoppage by the defendants. Illins afterwards, and long before the commencement of this action, adopted and ratified all which had been done both by Hubback and the defendants. The only point for our decision is, whether the title of Carne & Telo had been divested by the stoppage in transitu; for if not, then undoubtedly the goods belonged to the plaintiffs as their assignees, and, as there was a clear conversion by the defendants, the plaintiffs would be entitled to recover.

Mr. Crompton, for the defendants, made two points: first, that there was a good stoppage on the 13th May, under the power to Hubback; and, secondly, if that be not so, still, that the subsequent ratification by Illins made the previous stoppages by the defendants good. As to the first point, we are of opinion that there could be no valid stoppage in transitu after the formal demand of the goods by Bird on the 11th May, and the subsequent delivery of them to the defendants. The goods had then arrived at Liverpool, and were ready to be delivered to the parties entitled. Bird, on behalf of the assignees, demanded the goods, and tendered the amount due for the freight. Assuming that there had been no previous stoppage in transitu, the masters of the several ships were thereupon bound to

deliver up the goods to Bird, as representing Carne & Telo, and they could not, by their wrongful detainer of them and delivering them over to other parties, prolong the transitus, and so extend the period during which stoppage might be made. The transitus was at an end when the goods had reached the port of destination, and when the consignees, having demanded the goods, and tendered the amount of the freight, would have taken them into their possession, but for a wrongful delivery of them to other parties.

On this part of the case we never entertained any doubt. The other point, namely, whether the several stoppages by the defendants before the 11th May, without any previous authority from Illins, were made good by his subsequent ratification of what had been done, appeared to us one of more nicety; but on full consideration, we are of opinion that here, too, the defendants must fail. In the first place, the power of attorney to Hubback, and his subsequent confirmation of the acts of the defendants, may be laid out of our consideration. The authority to Hubback was no doubt executed by Illins while the goods were in transitu, but that is not material unless the stoppage itself took place pending the transitus, and, so far as Hubback is concerned, that certainly was not the case; for he did not receive his authority, nor attempt to act in the matter, till the 13th, i. e. not till the day after the conversion complained of in this action. It is true that he then, so far as he lawfully could, adopted and ratified the acts of the defendants; but this was afterwards, before the commencement of this action, done by Illins himself, and so, if such ratification is good, there is no necessity for relying on the ratification of Hubback.

This therefore brings us to the real question, which is, whether the ratification by Illins, after a conversion by the defendants, can have the effect of altering retrospectively the ownership of the goods, so as to prevent the plaintiffs from saying that the goods were theirs at the time of the conversion, which, if no subsequent ratification

had occurred, certainly were theirs at that time, and would have so continued.

We are of opinion that the ratification by Illins had no such effect.

The doctrine "omnis ratihabitio retrotrahitur et mandato priori æquiparatur" is one intelligible in principle and easy in its application, when applied to cases of contract. If A. B., unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognize and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me; and when I afterwards agree to admit that such was the case, J. S. is precisely in the condition in which he meant to be; and if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue that he would have had against A. B.

In cases of tort there is more difficulty. If A. B., professing to act by my authority, does that which *primâ facie* amounts to a trespass, and I afterwards assent to and adopt his act, there he is treated as having from the beginning acted by my authority, and I become a trespasser unless I can justify the act, which is to be deemed as having been done by my previous sanction. So far there is no difficulty in applying the doctrine of ratification even in cases of tort; the party ratifying becomes, as it were, a trespasser by estoppel; he cannot complain that he is deemed to have authorized that which he admits himself to have authorized.

The authorities, however, go much further, and show that in some cases, where an act, which if unauthorized would amount to a trespass, has been done in the name and on behalf of another, and without previous authority, there a subsequent ratification may enable the party, on whose behalf the act was done, to take advantage of it, and to treat it as having been done by his direction.

But this doctrine must be taken with the qualification, that the act of ratification must take place at a time, and under circumstances, when the ratifying party might have himself lawfully done the act which he ratifies. Thus, in *Lord Audley's case*, a fine with proclamations was levied of certain land, and a stranger within five years afterwards, in the name of him who had right, entered to avoid the fine; after the five years, and not before, the party who had the right to the land ratified and confirmed the act of the stranger. This was held to be inoperative, though such ratification within the five years would probably have been good.

Now the principle of this case, which is reported in many books, — Cro. Eliz. 561; Moore, 457, pl. 630; Poph. 108, pl. 2, — and is cited with approbation by Lord Coke in *Margaret Podger's case* (9 Co. 106 a), — appears to us to govern the present. There, the entry, to be good, must have been made within the five years. It was made within that time, but till ratified it was merely the act of a stranger, and so had no operation against the fine. By the ratification it became the act of the party in whose name it was made; but that was not until after the five years. He could not be deemed to have made an entry till he ratified the previous entry; and he did not ratify until it was too late to do so. In the present case the stoppage could only be made during the transitus; during that period the defendants, without authority from Illins, made the stoppage. After the transitus was ended, but not before, Illins ratified what the defendants had done; from that time the stoppage was the act of Illins. But it was then too late for him to stop; the goods had already become the property of the plaintiffs, free from all right of stoppage.

We are therefore of opinion that there must be judgment for the plaintiffs. — *Judgment for the plaintiffs.*

The important maxim, "Omnis ratihabitio retrotrahitur et mandato priori æquiparatur," in its application to actions of tort, has been fully considered in the recent case of *Bird* v. *Brown*, (14 Jur., part 1, p. 132.) The facts

of that case were the following: — A merchant in America shipped certain goods to the account of merchants in this country, against whom a fiat in bankruptcy issued on the 8th May. On the arrival of the cargoes on the th, 7th, and 9th May, the defendants, during the continuance of the transitus, gave notice to the master and consignees of a claim to stop the goods in transitu on behalf of the American merchant; but they were not his agents, nor had they received any authority from him to make the stoppage. On the 11th May, the plaintiffs, the assignees of the bankrupts, demanded from the master and consignees the cargoes which were then on board the vessels in port, and undelivered; but delivery of them to the plaintiffs was refused, and on the same day they were handed over to the defendants, who on the next day refused to deliver them to the plaintiffs, on demand. The American merchant afterwards, and before the commencement of the action, adopted and ratified the acts of the defendants, and the question was, whether such ratification were equivalent to a prior authority, so as to afford a defence to an action of trover brought by the assignees against the defendants. The court of exchequer held, first, that there could not be any stoppage in transitu after the demand by the plaintiff on the 11th May, and the subsequent delivery of them to the defendants, — the transitus was then at an end; and, secondly, that the ratification after the transitus was ended was too late, and had not the effect of altering the property in the goods, which, at that time, had become vested in the plaintiffs.

The Court were of opinion that the doctrine involved in the maxim cited at the commencement of this article must, to enable the party on whose behalf the act was done, or his agent, to take advantage of it in an action of tort, be understood with this qualification, that the ratification must take place *at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies.* *Lord Audley's case* (Cro. Eliz. 561; and see 18 Vin. Ab. 157) was relied upon as supporting this view. There a fine, with proclamations, was levied of certain land, and a stranger, within five years afterwards, in the name of him who had the right, entered to avoid the fine. After the five years, the party having the right to the land ratified and confirmed the act of the stranger. This was held to be inoperative, though such ratification within the five years would probably have been good. The party having title could not be deemed to make an entry until he ratified the previous entry, and he did not do so until it was too late. So, in the principal case, the stoppage could be made only during the transitus; during that period the defendants, without authority, made the stoppage, and it was only after the transitus was ended that their act was ratified. The American merchant, however, at that time, could not stop the goods, and therefore could not ratify.

This decision, it will be seen, prevents the ratification from having a retrospective effect, or being equivalent to a previous command, unless the party ratifying could himself have lawfully performed the act at the time of the ratification; he has, in fact, no authority to give to the party acting, nor power of ratifying the act done. The Court also stated, that, as applied to cases of contract, the maxim is clear, and that if A., unauthorized by B.,

makes a contract on his behalf with C., which B. afterwards recognizes and adopts, the contract is to be dealt with as having been originally made by his authority; that, as applied to cases of tort, where it is sought to fix the party ratifying with liability, if A., professing to act by the authority of B., does that which *primâ facie* amounts to a trespass, and B. afterwards assents to and adopts his act, A. is treated as having from the beginning acted by his authority, and B. becomes a trespasser, unless he can justify the act. — *London Jurist.*

Court of Exchequer. — Dec. 7, 1849; *May*, 22, 1850.

HUTCHINSON, EXECUTRIX, *v.* YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.

No servant can recover damages from a master for injuries sustained by him through the negligent conduct of a fellow-servant.

THIS action was brought under the 9 and 10 Vict. c. 93, (for compensating the families of persons killed by accidents,) by the plaintiff, as widow and executrix of her husband, who was in the defendants' employ as clerk, to recover compensation from the defendants for his death, which was caused by an accident whilst travelling on their line. The defendants pleaded that the deceased was in their service at the time of his death, and that the accident was caused by the negligence of a fellow-servant. The plaintiff demurred to this plea. *Cur. ad. vult.*

Hugh Hill, in support of the demurrer; *J. Addison*, contra.

The court held, that the plea was good, as it constituted a complete answer to the action by setting out that the deceased's death was caused by the negligence of a fellow-servant; and in accordance with the decision in *Priestly* v. *Fowler*, 3 M. & W. 1, the demurrer was overruled.

WIGMORE *v.* JAY. — May 22, 1850.

WATSON, Q. C., moved for a new trial, on the ground of misdirection, in a similar action under the 9 and 10 Vict. c.

93. The deceased was a bricklayer in the employ of the defendant, a builder, and the death was occasioned by the breaking of a defective ledger pole used in the scaffolding, which, it appeared, had been brought under the notice of the foreman of the works, but, notwithstanding its state, had been used by his order. At the trial, before L. C. B. Pollock, at the Middlesex Sittings after Hilary Term, a nonsuit was, under the direction of the judge, entered, on the ground that there existed no cause of action.

Cur. ad. vult.

The Court said, that the rule must be refused on the principle laid down in *Priestly* v. *Fowler*, 3 M. & W. 1.

Recent American Decisions.

Jacob Dimick *v.* Samuel Brooks.

In an action upon a bond, conditioned for the payment of a debt by instalments, brought in the state of New Hampshire, the plaintiff recovered judgment for the penalty of the bond, and execution was awarded for the amount of the first instalment, which had then become due. *Held*, that the judgment for the penalty did not create an absolute indebtedness against the defendant, which could be enforced in this state by an action of debt upon judgment, in common form, for the purpose of enforcing payment of the instalments subsequent to the first.

The judgment for the penalty of the bond, in such case, is a mere creature of the statute, having no force whatever, except in the very Court where it is rendered, and will not, either by the law of New Hampshire or of this state, serve as the foundation for an action of debt, either in the common form of debt upon judgment, or by setting forth in the declaration the rendition of the judgment, the award of execution for the breaches accrued, and the accruing of subsequent breaches.

In order to sustain an action of debt upon a judgment, or upon any matter of record, the obligation must result from the record itself, and must be shown by the record, without requiring averments of additional matter. The record must show a still subsisting obligation, perfect in its inception, and still unsatisfied.

Quære, whether the courts of one state can give effect to the judgments of the courts of another state, by enforcing any of the collateral remedies, which the prevailing party may be entitled to have in the place where the judgment was rendered.

Debt on a judgment recovered in the Supreme Court of New Hampshire, in Grafton county, November term, 1818, in two counts. In the first count the plaintiff declared, in

common form, upon a judgment for $1000, debt and damages, and for $20.52 costs. In the second count the plaintiff declared on a judgment for $1000, alleging that it was recovered on the penalty of a bond, which was conditioned that the defendant should pay to W. B. Bannister $900, with interest annually, specified in nine notes, executed by the plaintiff to Bannister, dated July 23, 1814, payable yearly on and after May 1, 1817, "and also save and keep harmless the said Dimick from all cost, trouble, and expense, that might accrue to him from or by reason of said notes not being paid according to their tenor and effect;" and that, it appearing that one of said notes only was then justly due and unpaid, it was therefore ordered by said Court, that execution then issue for the sum then due on said note, being $121.76, and said costs, being $20.52; and that, after the execution of said bond, and after the rendition of said judgment, the defendant neglected to pay said notes, or to save harmless the plaintiff from the costs, trouble, and expense, which accrued to him from said money not being paid by the defendant to said Bannister, as the same from time to time became due, according to the tenor and effect of said notes; and that the plaintiff has been compelled, by reason of said neglect, to pay to said Bannister, since the rendition of said judgment, the amount of all said notes, according to the tenor thereof, and which the defendant has wholly neglected to pay; and that said judgment still remains in force and unpaid, except as to the amount of said execution, so awarded by said Court, which has been paid to the plaintiff. This action was commenced in October, 1843.

To the first count the defendant pleaded, 1. *Nul tiel record;* — on which issue was joined to the Court. 2. (After craving *oyer* of the record and setting it forth,) that the defendant paid to the plaintiff the amount of the execution awarded; — to which plea the plaintiff demurred. To the second count the defendant pleaded, 1. That the action was not commenced within eight years after the rendition of said judgment, and that, when said judgment was ren-

dered, the defendant was within this state; — to which plea the plaintiff demurred. 2. That the action was not commenced within eight years next after the rendition of said judgment, nor within eight years next after all the damage, which the plaintiff ever sustained, or which accrued to him by reason of said notes not being paid according to their tenor and effect, was sustained by or had accrued to the plaintiff. To this plea the plaintiff replied, that before said notes became due, to wit, December 1, 1819, the defendant departed and removed from this state, and from the United States, to Canada, and there resided until within eight years before the commencement of this action. The defendant rejoined, that, after the said alleged departure and removal, the plaintiff was not farther damnified by reason of the non-payment of the notes, or any part thereof. To this rejoinder the plaintiff demurred. The record, offered in support of the issue under the plea of *nul tiel record*, was the same described in the second count in the declaration.

The County Court, March Term, 1846, Redfield, J., presiding, adjudged, upon the plea of *nul tiel record*, that there was no such record, and also adjudged, that the first plea to the second count of the declaration was sufficient, and that the rejoinder to the replication to the second plea to the second count was sufficient, and rendered judgment for the defendant. Exceptions by plaintiff.

J. Collamer, and *Tracy & Converse*, for plaintiff.

It may be assumed as fully settled law, that, in all cases where there is a personal civil obligation, the same may be enforced against such person in any civil jurisdiction where he may be found. In giving construction to the contract, and ascertaining the nature and extent of the obligation, the law of the country in which the contract was made, or the *lex loci contractus*, is regarded, not *as law*, but as a method of ascertaining the extent of the obligation. The manner of enforcing the obligation depends entirely on the law of the jurisdiction where such proceedings for en-

forcing it are taken, — the *lex fori.* The former determines the right, the latter the remedy. It is therefore entirely untrue, that, because the same remedy cannot be given here as in the state or country where the obligation was incurred, therefore none can be given. Municipal regulations and obligations of public relation are not mere matters *inter partes*, and constitute an exception to the general rule. Such was the case of *Pickering* v. *Fisk*, 6 Vt. 102. It is true, that at one time it was supposed, that the form of the remedy, and especially the final process, was qualified, or affected, by the *lex loci contractus. Melan* v. *Fitz James*, 1 B. & P. 138. But this is now everywhere exploded. The *lex fori* regulates, alike, the form of the action, the form of the judgment, and the form and effect of the final process for its execution. Story's Confl. of Laws, 475, § 567, 568; Ib. 478, § 571; Ib. 479, § 572; *Warren* v. *Lynch*, 5 Johns. 239; *Andrews* v. *Herriot*, 4 Cow. 508; *Hinckley* v. *Marean*, 3 Mason, 88; *Pickering* v. *Fisk*, 6 Vt. 102.

That Brooks was under legal obligation to Dimick, by virtue of the judgment in New Hampshire, is most obvious. In that judgment the bond had become merged. The judgment stood in full force, to be pursued from time to time, as breaches in the condition of the bond transpired. The law of New Hampshire, as to the mode of proceeding on penal bonds, is much like that of other states, and all are substantially the statute of William III. Judgment is rendered for the penalty, the same as at common law; but instead of the defendant resorting to chancery for relief, as before the statute, the breaches then existing are shown to the court, who issue execution for so much of the judgment, and then, by the very words of the statute, the judgment remains in full force, as security for subsequent breaches, which may be shown on *scire facias*, and execution issued from time to time, *pro tanto.* But there is but one judgment, and execution can never issue, so as to exceed that judgment in amount. In this case, after judgment, one breach was shown, and execution issued

therefor, and was paid, and this action is pursued only for the subsequent breaches. For this obligation can there be a remedy in Vermont? And, if so, what must be the form of that remedy? *Scire facias* cannot be sustained, as that is confined to the court which rendered the judgment and has the record thereof; it is but a proceeding to procure the order of court for the issue of execution on the existing judgment. Should an execution for a part of such judgment be, on *scire facias*, ordered by the court to issue, and should not be paid, will any one insist, that debt on judgment could be any where sustained therefor, by itself, separate from the judgment itself? All these, however, are but forms of remedy, modes of redress, confined to the place of judgment and peculiar to it. What is the form of remedy here? Clearly the action of debt on judgment,—debt on that one, only judgment, which has been rendered in the case. In declaring on that judgment, there is no more occasion to set out the subsequent proceedings, which appear on the record, than there would be, when declaring upon an ordinary judgment, to set out the issue of execution and the return of *nulla bona* thereon, which appear on the record. The fact, that the record shows more than the judgment, does not require it to be set out in the declaration.

If it be here insisted, that by this course the defendant, having judgment rendered against him on this judgment, is deprived of the privilege of having the court confined to issuing execution against him only for the additional breaches, as this action, being on judgment, and not on bond, is not within the statute, — we answer, he must do what all men had to do at common law in such cases, before the statute of William III., that is, resort to chancery for relief. But this constitutes no objection to a judgment for the plaintiff, according to the course of the common law, which is the law of the court, except when changed by the statutes of the state.*

* The learned counsel also argued at length the question as to the statute of limitations, as did also the counsel for the defendant; but the case being decided by the court upon the question as to the sufficiency of the form of action, the other points made need not be noted.

H. Everett, *O. P. Chandler*, and *Washburn & Marsh*, for defendant.

1. As to the plea of *nul tiel record*, the defendant insists, that the record offered is not, *per se*, evidence of the debt demanded, but is conclusive evidence, that the amount, for which execution was awarded, was the only existing debt at the time of rendering the judgment. But on a default, or on this issue found for the plaintiff, the judgment, according to the common law, must follow the declaration, and be rendered for the whole sum demanded, with interest as damages; which this court cannot change. If the action had been brought in December, 1818, upon the failure to pay the note which fell due May 1, 1818, (and it would have lain then, as well as in 1843,) the judgment must have been the same. But it may be urged, that this might have been avoided by a plea, that the judgment was conditional by the law of New Hampshire, and stood only as security for farther breaches of the bond, &c., and that the defendant had kept the condition, &c. Such a plea would contradict the record, and would not be sustained by the rules of the common law. The defendant is not entitled to *oyer* of a record, nor does the bond form part of the record. He must, then, set forth the record at his peril; he must take the condition of the bond, as the plaintiff has chosen to place it on the record. It deprives the defendant of the plea of *nul tiel record*, unless he hazard the having an absolute judgment against him for the whole sum demanded. And on such pleadings a conditional judgment must be rendered. Under what law? The effect of a foreign judgment can be none other here, than in the state where rendered. This not being a common law judgment, its effect must depend upon the law of New Hampshire. It is not a debt there, (*Shepard* v. *Parker*, 2 N. H. 363,) but stands as security for farther damages. The only remedy then, as in like cases here, is by *scire facias*, issuing from the court in which judgment was rendered.

2. The second plea to the first count, after *oyer*, sets

forth payment of the execution awarded. The object of this plea is, to extinguish any debt apparent on the record. The demurrer to this plea opens the question of the sufficiency of the first count. Though the plaintiff was not bound to give *oyer*, yet, having given it, the record (as to this plea only) becomes a part of the declaration.

3. *As to the declaration.* The action of debt will not lie on a similar judgment, rendered in this state. It is a statute judgment, and can be enforced only according to its provisions. The remedy is local, — to the court in which the judgment is rendered. If it be a statute judgment, it cannot, on common law principles, be enforced here. *Pickering* v. *Fisk*, 6 Vt. 102. A *scire facias* would be one step nearer to the analogy of our laws; it would only require a naturalization of the judgment. The remedy by action on the bond, the judgment in New Hampshire *non obstante*, would be a less exceptionable remedy. In both cases the subsequent proceedings would be according to the course of our law, after legislating, to legalize such action. The form of the action is unknown to our law, — debt on the case on judgment. It is extending the statute of this state to a judgment of another state, and enforcing it by a remedy unknown to the laws of either state What will be the effect of a judgment here, on the existing judgment in New Hampshire? Will it be a bar to future proceedings there? Suppose the action had been brought in 1818, on the non-payment of the second note; would it affect the remedy in New Hampshire on failure to pay the third note? What judgment is to be rendered, — a judgment for the whole $1000, — for the $1000 less by the execution awarded, — or for the plaintiff's actual damages? But it may be urged, that, unless the action be sustained, the plaintiff is without remedy, the defendant residing out of New Hampshire. But this objection applies in all cases, where the remedy is local, — as on sheriffs' and executors' bonds, bail bonds, bail on mesne process, trespass on the freehold, &c. It is to be presumed, that the laws of New Hampshire afford an adequate remedy on local judgments, against ab-

sentees. And on such awards of execution, debt, or *indebitatus assumpsit*, would lie in any state.

The opinion of the court was delivered by

REDFIELD, J. This is a case, which, so far as we are informed, has never occurred under the Federal Constitution. The object of the suit is, to enforce a bond with condition for the payment of a debt by instalments. The bond was executed in the state of New Hampshire, and there sued, after the first instalment fell due, and, under a statute provision similar to the English statute and that of of this state, and most of the other American states, judgment was entered in the New Hampshire court, for the penalty of the bond, being $1000, and execution awarded for the first instalment, — which has been paid. This judgment was rendered so long ago as 1818, and the present suit was brought in 1843.

The declaration in the present case is in debt, in two counts; first, upon an absolute judgment for one thousand dollars; secondly, setting forth all the facts in the case, and averring, that the other notes have become due, which, by the bond, it was the duty of the defendant to pay and indemnify the plaintiff from paying, and that they have not been paid by the defendant, whereby the plaintiff has been compelled to pay them. There is a multiplicity of pleading in the case, with reference to both counts, but ending in demurrers reaching back to both counts. Two important questions arise in the present case.

1. Whether this action of debt upon judgment will lie, in the form of either count, upon any such record, as described in the second count, and which is confessedly the only record upon which the plaintiff expects to recover? This, if found for the defendant, is, of course, conclusive of the case.

2. Whether, if such declaration can be maintained upon any such state of facts, as disclosed in the case, the claim is barred by the statute of limitations? In regard to the first question, we have certainly felt disposed to get over it, if it could be done consistently with established forms, as

courts always do merely formal exceptions. But we have encountered difficulties, which to us seemed insurmountable. The form of the action is merely and simply debt upon judgment. And the counsel, whose advice and argument have been chiefly relied upon, we are told at the bar, and whose written argument we have read with care and interest, have placed the case almost exclusively upon the first count, treating the judgment for the penalty as an absolute debt. But in our apprehension, although this view of the case is the only one, which goes clear of serious technical objections, it is in no sense maintainable. It is giving a force and extension to the contract, which it was never intended to have, and which it never could have, by the *lex loci*. It is, in every sense, a misdescription of the contract. A contract with condition, or in the alternative, (with the exception of a penal bond, which rests upon peculiar grounds,) must be truly described, setting forth its conditions. If this case be treated as an absolute judgment at law, now, so might it have been six months after its rendition, and thus have compelled the defendant to go into chancery to enjoin a suit upon his contract, before it fell due, and leave him entirely remediless at law. This, if not a violation of the United States' Constitution, by impairing the obligation of the contract, is certainly a violation of the very first principles of moral justice, by giving to the defendant's contract a force and extension, which it was never intended to have, and which by the *lex loci* it never could have had, and depriving him of a defence, which, by the law of the place of contract, he was entitled to insist upon in any suit upon the judgment. Much more might be said upon this point; but we deem it unnecessary.

3. Upon the point, whether this action could be sustained upon the second count, we have entertained more doubt. There seems to be a justice and propriety, that the plaintiff should have the same or an equivalent redress, upon his contract, in all the states of the Union. Art. 4, sec. 1, of the Constitution of the United States, in terms,

provides, that "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And Congress may, by general laws, prescribe the manner, in which such acts, records, and judicial proceedings shall be proved, and the effect thereof." This Congress have done, at a very early date, 1790, and have, in express terms, provided, that such "proceedings shall have such faith and credit given to them in every court within the United States, as they have by law, or usage, in the courts of the state from whence the said records are or shall be taken." This, taken in its most unlimited sense, might require us to allow a writ of *scire facias* upon all judgments coming here to be enforced from any of the other states of the Union. But even that will not require us to allow an action of debt, unless such is the effect in New Hampshire. And the contrary has been expressly decided there. In *Pierce* v. *Read et al.*, 2 N. H. 363, Richardson, Ch. J., in giving judgment in the case, says, "At the December term of this court, 1814, in the case of *Mary Shepard* v. *Edmund Parker*, it was decided, that debt did not lie upon a judgment, rendered for the penalty of a bond, in pursuance of this clause of the statute, [having before set it forth *in hæc verba.*] The grounds of such decision were, that such a judgment was the mere creature of the statute, rendered, not for the purpose of being enforced by execution, or an action of debt, but to stand as a security for any damages resulting from any future breaches of the condition of the bond, and to be liquidated upon a *scire facias* brought for that purpose." In the principal case before the court it was held, that debt will not lie upon a bail bond, taken upon *mesne* process.

The New Hampshire statute, like our own, and like the English statute, provides, that, in all suits upon bond with penalty, the court shall enter up judgment for the penalty, and issue execution for the damages already accrued. "And the plaintiff may at any time afterwards have from the court, where such judgment was rendered, a writ of *scire facias* against the defendant, to show cause, why execution

should not be awarded upon said judgment for other and farther damages." This judgment, for its construction, force and validity, must depend upon the law of the place of contract; and that, we have seen, is effectually settled, by the solemn determination of the court of last resort. And we find no ground to question the perfect soundness of that determination, upon general principles, applicable to the subject. We entertain no doubt such is the law of this state.

We must, then, give this judgment an effect, which it has not in the place where rendered, and would not have, if rendered in this state, in order to sustain this action in its present form. This would certainly not comport with the general principles of the law, applicable to the subject, and would be a needless extension of the remedy, unless it were clearly made to appear that the party is otherwise altogether remediless. It would certainly be going quite beyond the range of the United States' Constitution and statute, upon this subject.

But, upon general principles and sound analogy, it seems to us, there is no good reason for allowing this action of debt upon this record. It is of the very essence of debt upon judgment, or upon any matter of record, that the obligation should result from the record itself. The record imports absolute and complete verity. It is neither to be increased, nor diminished, by any averment, out of or beyond the record. It is to the record, as the law and the testimony, upon which the pleader refers his claim. The record is formally vouched, in the conclusion of the declaration, as the basis of the claim. The defendant may crave *oyer* of the record, and have it set forth in terms, as part of the pleading, and, if it do not sustain and fully sustain the declaration, may demur.

But, in the present case, the plaintiff's claim to recover of the defendant rests mainly *in pais*. It has to be made out by averments, in addition to the record, and of facts which have, in the very nature of the case, transpired since the former adjudication. So that the claim, so far from

being matter of record, rests mainly *in pais;* and if denied, instead of being determined by the court, upon inspection of the record, which is the only mode of trying matters of record, it must be determined by the jury, upon the testimony of witnesses. We believe it will be found to be an universal rule, in regard to the action of debt upon any matter of record, that the record itself must show a still subsisting obligation, perfect in its inception, and still unsatisfied.

But the plaintiff's claim seems to us, so far as the judgment for the penalty of the bond is concerned, to be precisely the same, in every other *forum*, as if no such judgment had ever been rendered. That adjudication seems to be a mere creature of the statute, and having no force whatever, except in the very court where rendered. For all other purposes it is a mere nullity. It is impossible for any other tribunal, with the least show of regard to established precedent, to take up the matter at the point where the former proceeding left it, and carry it out. We might, with the same propriety, entertain a petition for a new trial, a writ of error, an *audita querela*, or a *scire facias* against bail, as to attempt to carry into effect this merely inchoate proceeding of the New Hampshire courts. And if we were to attempt it, it would be more consistent to do it by *scire facias*, or petition, than by an action of debt. The judgment for the whole penalty was mere form, and may be done again and again, in every successive suit upon the bond, as new breaches accrue, and no more embarrasses the plaintiff, than if the bond were a single bond of indemnity without penalty. The penal portion of the bond is mere form, and may be omitted altogether, and so is the adjudication upon it. The judgment in the New Hampshire court was for the damages then accrued, and concluded nothing more, and merged nothing more. The bond, as to all the other obligations, beyond the courts of New Hampshire, remained the same as before. It is, at most, the mere pendency of a suit in that state, which is not even matter of abatement to a fresh suit brought here.

And it is questionable in my mind, whether the courts of one state can give effect to the judgments of the courts of another state, by enforcing any of the collateral remedies, which the prevailing party may be entitled to have in the place where the judgment was rendered. Hence, I conclude, that *scire facias*, or debt, upon recognizances of bail, or *scire facias* against bail on *mesne* process, and suits against receiptors of property, and upon replevin bonds, or against sheriffs, for neglect of duty, are confined to the local jurisdiction. This seems to be the principle of the decision in *Pickering* v. *Fisk*, 6 Vt. 102. Prison bonds and warrants of attorney to confess judgment would also, very likely, be limited in their operation to the jurisdiction where executed. It is clear, that *scire facias* must be confined to the court having the record.

But it is needless farther to discuss this very obvious question. It is in vain to treat this, as in any sense a judgment, importing an obligation, upon which to found an action of debt. It is, at most, an inchoate proceeding, the mere pendency of an action. It is in no sense a more perfect judgment than a default, or judgment upon demurrer, where no damages have been assessed, and where they rest *in pais*, and depend upon proof, to be adduced in court. In such case, which is certainly stronger for the plaintiff than the present, it would seem absurd to claim, that a court in another state, or indeed any other court, could perfect the judgment. We might as well expect, that if a defendant leaves one state and goes into another, after the service of process upon him, the court of the latter state will take up the proceedings at that very stage, and perfect the judgment.

The judgment upon these pleadings must be for defendant.

Leave was granted to amend, upon terms of paying all costs to the time of amendment, and taking no costs before that time.

Oliver C. Woodward *v.* Alonzo Thacher.

If the owner of an unsound horse sell the horse, warranting him to be sound, the buyer may sell the horse for the best price he can obtain, without first offering to return him to the vendor; and if the buyer act with common prudence and discretion in disposing of the horse, the rule of damages, in an action for deceit brought by him against the vendor, will be the difference between the price which he obtained for the horse and what the horse would have been worth, if he had been sound, as he was warranted to be.

Trespass on the case for a false warranty, or deceit, in the exchange of a horse. Plea, the general issue, and trial by jury, November Term, 1846,— Kellogg, J., presiding.

On trial, the plaintiff gave evidence tending to prove, that he exchanged horses with the defendant, on the 17th of December, 1845, and that, in the contract of exchange, the defendant warranted the horse, by him transferred to the plaintiff, as being then sound; that the horse was then in fact unsound and diseased, and continued so during all the time the plaintiff owned him; that while the plaintiff owned him, the horse, though well treated and fed, remained poor, and did not improve, and continued so diseased, that most persons, who examined him, considered him as of no value; that the plaintiff, regarding the horse as having an incurable disease, on the 20th day of February, 1846, sold him for ten dollars, which was the most he could obtain; and that the horse, if sound, would have been well worth one hundred dollars.

The defendant gave evidence tending to prove, that he did not warrant the horse, but only represented, that the horse had been affected with the horse distemper the previous spring, the effects of which were still upon him, and also gave evidence tending to prove, that whatever ailed the horse was but the effect of that disease. The testimony also tended to prove, that the horse, after he was sold by the plaintiff, had ultimately recovered, so that he had been recently sold for more than one hundred dollars, and that, at the time of the present trial, he was apparently sound and well.

The defendant requested the court to charge the jury, on

the subject of damages, that, if the plaintiff was entitled to recover, it was so much as the disease, which was upon the horse, lessened the actual value of the horse, or only so much, as that would have lessened his value to the plaintiff, if the plaintiff had kept and treated the horse, as he had since been kept and treated.

But the court instructed the jury, upon this point, that, if they found the warranty proved, as alleged by the plaintiff, and that the horse was then unsound, the plaintiff was entitled to recover such amount of damages as he suffered from that unsoundness, that is, the difference between what he obtained for the horse, and what he would in fact have been worth to him, if he had been sound, as warranted, if the plaintiff, in the keeping, treatment and disposing of the horse, exercised ordinary care, diligence, prudence and discretion; and that, if they should find, that the horse, since he was sold by the plaintiff, has, by the treatment he has received, entirely recovered, yet if that recovery were contrary to the reasonable expectations entertained in relation to the horse, when owned by the plaintiff, it should not diminish the plaintiff's claim for damages.

Verdict for plaintiff. Exceptions by defendant.

Washburn & Marsh and *Tracy & Converse*, for defendant.

The defendant insists, that his liability is to be determined by the actual condition of the horse at the time of the sale; and that this liability cannot be enhanced by any subsequent conduct of the plaintiff, in the management or disposal of the horse. Any other rule would allow the plaintiff to kill the horse, and then make his own judgment, instead of the condition of the horse, the standard for determining the defendant's liability.

But at least the plaintiff should have offered to return the horse to the defendant, and have thus given him an opportunity to rescind the bargain; and without doing so, the defendant insists that he cannot be made liable for the enhanced damages. Selw. N. P., Tit. Deceit; *Chesterman* v. *Lamb*, 2 Ad. & E. 129, [29 E. C. L. 50]; *Buchanan* v.

Parnshaw, 2 T. R. 475; *Clare* v. *Maynard*, 32 E. C. L. 713; *McKenzie* v. *Hancock*, R. & M. 436, [21 E. C. L. 484.]

C. Coolidge, for plaintiff.

The legal rule of damages is, that the party is to be put in as good condition, as he would have been in, had the contract been performed. *Ferris* v. *Barlow*, 2 Aik. 106; *Cary* v. *Gruman*, 4 Hill, 625; *Voorhees* v. *Earl*, 2 Ib. 288. Inasmuch as no other evidence of the market value of the diseased horse was given, than what was furnished by the highest price the plaintiff could obtain for him, — and he was not bound to keep the animal, — the court correctly put the rule, as between what the horse was sold for and what he would have been worth, if sound. As to the first part of the defendant's request, the court gave instructions substantially conforming to it; and the latter part of the request demanded the conditions, that the plaintiff was bound to keep the animal, until he should die, or be restored to soundness, and meanwhile treat him curatively, just as others have done, — the one condition unreasonable, the other impracticable.

The opinion of the court was delivered by

Hall, J. We think, the charge of the county court was entirely correct. The defendant had warranted the horse sound, when he was unsound. He had violated his contract. The plaintiff found a different horse on his hands from the one he had contracted for, — a sick horse, which he cannot be supposed to have wanted. It would be unreasonable, that he should be obliged to incur the trouble and risk of keeping him for a long period, in order, by experiments in medical or other treatment, to ascertain if he could not be made more valuable to him. It is but just, that he should be at liberty to get the horse off his hands in the best manner he could; and if, in disposing of him, he acted with common prudence and discretion, we can see no reason, why the price obtained for him should not be deemed the proper measure of his value. The difference between the price obtained and what the horse ought to be

worth by the warranty, would be the actual loss, which the plaintiff would sustain by the defendant's breach of contract; and it is right, that the plaintiff ahould be allowed to recover it.

It is insisted in behalf of the defendant, that, by the English authorities, the price for which an unsound horse is sold by the purchaser, cannot be taken as the measure of his value, in estimating damages, unless the purchasee have previously offered to return him to the seller. But the authorities cited do not support this position. They merely show, that when the plaintiff seeks to go beyond the difference in value between the horse as sound and unsound, and, over and above that difference, claims to recover special damages for the keeping of the horse, until he could sell him, he must show, that he had previously offered to return him. None of the cases go farther. In *Caswell* v. *Coare*, 1 Taunt. 566, the reason given by Ch. J. MANSFIELD for the rule, that the plaintiff must offer to return the horse, before he can claim damages for the keeping, is, that it is not the defendant's fault, that the plaintiff keeps him. For he adds, "when the warranty was broken, the plaintiff might *instantly* have sold the horse for what he could get, and might have recovered the residue of the price in damages." It is only, then, where the purchaser desires to charge the seller with the expense of keeping the horse, until he can have an opportunity of selling him, that any offer to return him is necessary.

It distinctly appearing from the bill of exceptions, that the jury, under the charge, could have found no other damages than the difference between the horse as warranted and what he was actually worth to the plaintiff, we are satisfied the verdict was right. The judgment of the county court is therefore affirmed.

Supreme Court of New York — General Term.

Before EDMONDS, Presiding Justice; EDWARDS and MITCHELL, Justices.

DECISIONS — MAY TERM, 1850.

Mary A. Dobson v. *Eliza Racey.* — The report of a referee on the facts, where the whole issues are referred, will not be set aside, except on the same grounds on which a verdict would be set aside as against evidence. A person in receipt of rents of land, for the benefit of those interested, is a good witness, between two claimants of the land, she being merely a stakeholder, and entitled to file her complaint of interpleader between them.

Stephen C. Phillips v. *William Burger.* — The rule, that specific performance will not be decreed of a contract respecting goods and things in action, is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy. A specific performance of a personal contract will be enforced where the party wants the thing in specie, and he cannot otherwise be compensated; where an award of damages would not put him in a situation as beneficial as if the agreement were specifically performed, or where compensation in damages would fall short of the redress to which he is intitled. The remedy of specific performance being mutual and reciprocal, if the party agreeing to sell an article would be bound to perform specifically, he can compel the other party to pay, notwithstanding that a decree in his favor would be nothing more than a verdict and judgment at law.

The Sun Mutual Insurance Company v. *The City of New York.* — Mutual Insurance Companies are liable to taxation on their capital, the same as other monied corporations. Such capital consists, in the first instance, of such amount of premiums as, by their act of incorporation, they are required to have subscribed before commencing business, and afterwards, of such sums as they may accumulate from premiums earned, and other sources of profits, and which are used by them as capital, in the business of insurance.

Jacob Acker, sheriff, v. *Susan Ledyard.* — Where a sheriff, having in his hands an execution against a person occupying premises as a tenant, before a sale receives a notice from the landlord of rent in arrear, the payment of the money collected by him into the court, out of which the execution issued, will not be a bar to a suit by the landlord for the amount of such rent. Where the execution creditor, as well as the tenants, admits that a certain sum is due to the landlord, the sheriff cannot discharge himself from liability to the landlord by paying the money into court, in a suit to which such landlord is not a party.

Joseph Dupre v. *Aaron Thompson.* — A voluntary conveyance will not be set aside on the application of the grantors, on the ground that they were ignorant of its legal effect and operation, and made a mistake in point of law. Courts do not relieve from their acts and deeds, fairly done on a full knowledge of the facts, though done under a mistake of the law.

This rule prevails in all cases of compromises of doubtful, and perhaps in all cases of doubted rights, and especially in cases of family arrangements, but is relaxed where there is a total ignorance of title, founded in the mistake of a plain and settled principle of law, and in cases of imposition, misrepresentation, undue influence, misplaced confidence or surprise. It is now to be regarded as well settled, that any legal trust is sufficient to sustain a devise or conveyance to a trustee of an estate, commensurate with such trust, without reference to the illegal trusts attempted to be created in the same estate; and that in trusts of personal property, a suspension of the absolute ownership of a part illegally, will not necessarily render void the disposition of the residue. The statute is to be allowed to work out the destruction of the legal parts only, when they would of necessity uphold the illegal parts with them.

William C. Heyward v. *The City of New York.* — Where the defendants were authorized by an act of the the legislature, to take certain lands, private property, for the public purpose of an alms-house, and upon paying the value, were to be seized in fee simple absolute of the land, and the value was paid and received by the owner. The defendants were authorized, when afterwards the public no longer required the lands, to sell them as their own property, and apply the avails to their own use; and the heirs of the original owners did not, on the abandonment of such public use, become seized of the premises, nor did they revert to such heirs.

Charles M. Guild v. *Lewis Rogers.* — The act abolishing distress for rent, which took effect on the 2d June, 1846, renders a distress in July, 1846, for rent due on the 1st of May previous, unlawful, where the right to distrain was not stipulated for in the lease and formed no part of the contract of letting. The act, in such case, merely took away a remedy, and in no respect impaired the contract; that it left open to be enforced by a suit at law, like all other contracts for the payment of money. The act has done nothing more than change the remedy, and is liable to no constitutional objection.

John Pearce and others v. *David C. Colden* and others. — Where, simultaneously with a lease, an agreement is made, whereby the landlord stipulates that at the end of the term he will renew the lease or pay for the building, and at the end of the term tenders a renewal which the tenant refuses to receive, the landlord is entitled to recover possession without paying for the buildings. Where the land in question has on it a house occupied by several tenants, who occupy different apartments, they are joint occupants of the land, and may be proceeded against jointly as defendants.

Abraham R. Luyser v. *Sniffen.* — The writ of error involving only the propriety of the Common Pleas refusing to set aside a report of references on questions of fact. Judgment affirmed.

James Lynch and wife v. *Peter R. Livingston.* — A Commisioner of Deeds in taking an acknowledgment of the execution of a deed, acts ministerially, and not judicially; and it is not, therefore, any valid objection to his act that he is related to the parties. The County Clerk, in certifying to the official act of the Commissioner, and the genuineness of his signature,

also acts ministerially, and that act may be performed by deputy, it neither being a judicial act, nor one personal to himself. A deed, not good as a lease and re-lease, by reason that the grantee is not in possession, nor valid as a covenant, to stand seized to uses, because there is no consideration of blood and marriage between the covenantor and covenantee, may yet be good as a bargain and sale, notwithstanding the granting words are "remise, re-lease and quit-claim," if there is a pecuniary consideration expressed in the deed, and there is an evident intention to convey *in presenti* the whole of the estate of the grantor.

Daniel D. Conover v. *John E. Van Nest and others.* — In an action for the recovery of the possession of personal property, the defendant is liable to be arrested if the property has been removed, concealed or disposed of so that it cannot be found by the sheriff, and it is not necessary, in order to justify such arrest, to show that such removal, &c. has been done feloniously, fraudulently or in bad faith. It is enough simply to show that it has been removed, &c., beyond the power of the sheriff to take it. In such case it would seem to be useless for the Judge who orders the arrest to specify the amount in which the defendant is to be held to bail, for by sections 187 and 211 of the code, he can be discharged from arrest only on giving bail in double the value of the property as fixed by the plaintiff, and that not for the defendant's appearance in the action merely, but for the return of the property, if return be adjudged and for the payment of any sum which may for any cause be awarded against him, and in such case the bail cannot surrender their principal.

Ab. B. Miller ads. *Stephen Burrows.* — Where a defendant formerly resident in Indiana has removed to this state with his family, but remains undetermined whether he will establish his residence in this state or elsewhere, where the prospects of business may call him, he is a non-resident of this state, and may be proceeded against as such, by attachment. In such case it is not necessary that he should be a resident elsewhere; it is enough that he is not a resident here.

John C. Martin v. *John Strahan.* — The defendant having, in his answer, which is responsive to the bill, denied the fact of notice of the injunction in the original suit, and the contrary being proved by only one witness, he ought not to be held responsible by reason of said notice.

Chrystal and Pollard v. *The People.* — A deposition taken conditionally in the case of a charge for a criminal offence, and before indictment, which is entitled in a Court of General Sessions, where there is no suit or proceeding pending, and in a suit which has not yet been commenced, and which, throughout, refers to the accused, not by their individual names, but as defendants, cannot be read on the trial of an indictment afterwards preferred on that charge, because of the rule that on such deposition the witness cannot be convicted of perjury for any false swearing.

John M. Lowerre ads. *Stephen Weeks.* — Though the rule is otherwise in some of the United States, in this state it is well settled that the testimony given by a witness on a former trial cannot be given in evidence, unless he be dead; his mere absence from the state is not enough.

Abstracts of Recent English Decisions.

Court of Chancery.

Styles v. *Guy*, Nov. 12, 1849. *Executor's Liability — Outstanding Assets — Devastavit.* At the time of the testator's death, A., one of three executors and trustees named in the will, who had been the solicitor and agent of the testator, had in his hands a large sum of money belonging to the testator. All the executors proved the will, but A. principally acted. The co-executors knew that A. was considerably indebted to the estate, but were not aware of the exact state of the account, and did not take any effectual means to oblige A. to come to an account, and secure the debt. After six years A. became bankrupt. *Held*, that the co-executors were liable personally to make good the loss to the estate, with £4 per cent. interest from the time of the testator's death. There is no distinction, in principle, as a question of negligence, in an executor allowing a debt to the estate from his co-executor to remain unsecured, and a debt from any other party. 14 Jur. 355. [In this decision, the cases of *Shipbrook* v. *Hinchinbrook*, (11 Ves. 254;) and *Langford* v. *Gascoyne*, (Ib. 335,) are doubted, if not overruled.]

Pimm v. *Insall*, Nov. 20, 1849. *Descended Estates — Creditors.* An agreement by an infant heir, upon marriage, to settle descended estates, but never properly carried into effect, is not such an alienation as can defeat the claims of the ancestors' creditors against the estates. 14 Jur. 357.

Rolls Court.

Allfrey v. *Allfrey*, Jan. 31, 1850. *Examination before Master.* By a decree made in the cause, it was declared that the plaintiff was not bound by a settlement of accounts with E. A., the administrater of G. A., in whose estate the plaintiff was interested; and the decree directed certain special accounts to be taken against the defendants, who were the executors of E. A. The Master, at the instance of the plaintiff, and on looking at the entries in an account-book proved in the case, allowed interrogatories, including a special one, for the examination of the defendants, without having a state of facts before him. *Held*, that the Master was under the circumstances justified in this course, and that if there had been irregularity the defendant had waived it. 14 Jur. 427.

Vice Chancellor of England's Court.

Owen v. *Penny*, April 19, 1850. *Construction of Will.* A testatrix bequeathed her house, furniture, &c. to A. for life, and directed that the

same should afterwards remain in the family of A. A. died, leaving five children. *Held*, that these children took as tenants in common. 14 Jurist, 358.

Willis v. *Willis*, May 4, 1850. *Principal and Surety — Concealment — Discharge of Surety.* A. covenanted to convey certain estates to B. free from all incumbrances except those specified, B and C. covenanting, as principal and surety, to secure the payment of an annuity to A. It afterwards appeared that part of the estates were subject to a mortgage not included in the specified incumbrances, the existence of which had not been discovered to C., and which A. alleged he had forgotten at the time. *Held*, that C. was discharged from his liability as surety.

Court of Common Pleas.

Yates et al. v. *Hopper*, Feb. 13, 1850. *Bankrupt — Indemnity — Authority irrevocable.* The drawer of an accommodation bill, a few days before it was due, voluntarily, and not in contemplation of bankruptcy, gave to th acceptor money wherewith to pay the bill. Before the bill was due, the drawer become bankrupt, and his assigns sued the acceptor for the amount of the bill, as for money had and received to their use. *Held*, that the action was not maintainable, as the authority to apply the money in payment of the bill, having been confined by the drawer upon the defendant in performance of his implied contract to indemnify, was irrevocable. 13 Jur. 372.

Lewis v. *Campbell*, Nov. 22, 1849. *Money paid — When Maintainable — Pleading.* In order to maintain an action for money paid, it is not necessary that the defendant should be relieved, by the plaintiff's payment, from a liability to a third person. The plaintiff, being indebted to one D., gave him an order on his agents, who were also the agents of the defendant, to pay D. the sum he owed him. The agents, however, with the approbation of the defendant, refused payment of the order, and informed D. that they had placed the amount to the credit of the defendant, in part discharge of a debt due from D. to the defendant. At the same time, by a letter addressed to the plaintiff, the defendant undertook to exonerate and bear the plaintiff harmless against any step D. might in consequence take against him. Subsequently D. brought an action for his debt against the plaintiff, which was defended in his name, and by his permission by the present defendant. A verdict in such action having been obtained by D., and the plaintiff having paid the amount of the debt and costs, to relieve himself from execution. *Held*, that he might recover the amount from the defendant in an action for money paid, and that he was not obliged to declare specially on the agreement to indemnify.

Bell v. *Welch et al*, January 29, 1850. *Guarantee — Evidence — Advances — Pleading.* The declaration on a guarantee stated that R. P. kept an account with a banking company, and was indebted to them in £800 for money advanced by them to him, and that it was proposed that they should

advance R. P. more money; and thereupon an argument was entered into between the company and the defendants, and signed by the defendants, as follows: — "We, the undersigned, hereby agree to indemnify (the company) to the extent of £1000 *advanced or to be advanced*, to R. P., but the said indemnity to cease when said R. P. shall have paid the sum of £1000 to the credit of his account." The evidence was, that, at the time the guaranty was given, £1400 was due from R. P. to the company for money already advanced. *Held*, that the guaranty, construed with reference to the facts existing at the time it was given, did not disclose a good consideration. *Held*, also, that if the preliminary averments in the declaration were to be taken as a statement of part of the consideration, they were put in issue by non-assumpsit, and not proved. 14 Jur. 380.

Notices of New Books.

A Treatise on the Law of Watercourses. By J. K. Angell. Fourth Edition. 1 Vol. 8vo.

The following is from the Author's preface.

"The author has been led also to perceive, while engaged in the revision of the authorities contained in the preceding edition, that they may be treated in the present work in a manner more circumstantial, and more explanatory of the facts and principles to which they relate. What, however, has contributed still more to the enlargement of the work, is the copious accumulation of judicial authorities, in further and important illustration of those which had previously been cited. But, beyond this explanation of its great increase in size, the addition which has been made to the use of water, as a motive power, has thrown open new sources of litigation, and has thus associated the subject more largely with the rudiments of general jurisprudence. This extended use has required a judicial construction of particular grants, and of written and unwritten contracts, of legislative acts, and of constitutional law, which, while it has much added to the volume, has vindicated the soundness of the assertion of Lord Mansfield, that the predominating characteristic of the common law is, that it is *a science of principles*."

We make the above extract from the preface of Mr. Angell's fourth edition, that our readers may understand what is contemplated. The well-earned reputation of the work renders any further notice superfluous.

Miscellaneous Intelligence.

PARENT'S CUSTODY OF CHILDREN. — A decision has recently been pronounced (*Thomas* v. *Roberts*, Vice-Chancellor Knight Bruce, 22d May) which appears to us to carry the doctrine of interference with the right of a father to the custody of his children, further than any case has yet gone. Of the jurisdiction of the Court of Chancery, as representing the Crown, to interfere between a father and his children, if he does not properly take care of them, no one of course entertains any doubt; nor is it to be doubted that the jurisdiction of the Court is not limited to cases where it finds the father actually improperly treating his children, but that it has power to interfere if it has reasonable ground to believe that he *will* improperly treat them. We are not going, therefore, to suggest any objection to the decision in *Thomas* v. *Roberts*, either on the ground of want of general jurisdiction, or on the ground that the petitioner's father was not actually bringing up his child improperly, but was only prospectively expected so to bring him up. The objection that we humbly submit may be made to this decision is, that the conduct and principles of the father, and of those with whom he was shown to be habitually living, were not so clearly and positively immoral or irreligious, as to draw to them the jurisdiction of the Court, unless the limits, not exceeded in the preceding authorities on the subject, are to be greatly exceeded.

In the first of the two leading cases on this subject (*Shelley* v. *Westbrook*, Jac. 266, and *Wellesley* v. *The Duke of Beaufort*, 2 Russ. 1) there was specific unmistakeable impiety in the father, and conduct considered upon the evidence to be the direct result of his principles. In the second there was specific unmistakeable debauchery of the grossest kind, practised under the very roof which he sought to make the shelter of his children, both male and female; clear and positive inculcation of blasphemy, immorality, and blackguardism, as regarded the male children. Mr. Shelley had abandoned the mother of his children, and cohabited with another woman; was, according to the report, the avowed author of a work not only deriding the Christian religion, but denying the existence of God; and not only had he been guilty of immoral conduct, but the Court, upon the evidence before it, was compelled to conclude that his immoral conduct was not mere human weakness, but the effect of his principles. So that there was an almost irresistible inference from the evidence, that Mr. Shelley would bring up his children to disbelieve, not only in Christianity, but in God, and to pursue a course of immoral conduct as a matter of right and propriety. Now, whether the law of this country does or does not look upon the bringing up of a child in the Christian religion as a duty to the State, it is tolerably clear that it does look upon the bringing up of children in the belief of a Supreme Being as such a duty; in fact, it imposes upon an avowed atheist some serious legal disabilities, which it does not impose upon persons professing any creed, however separated from Christianity.

In *Mr. Wellesley's case* the decision turned upon the immoral conduct, and not the irreligion, of the father. But the nature of the immoral conduct was not such as to admit of any doubt or discussion — that is, discussion whether it was immoral or not, within the meaning of the law, the doctrines of any known religion, and the usages of decent society. Part of his own conduct was actual crime at law: part of his method of bringing up his sons consisted in inculcating, as spirited and manly, the commission of acts which would be crimes, and punishable at law. It was not as if Mr. Wellesley had himself done, and had taught his children to do, things as to the morality of which decent men might differ: he had done, and instigated his children to do, things which were clear and unmistakeable sins against morality, punishable both by the ecclesiastial and civil law. So, in the dictum of Lord Eldon in *De Manneville* v. *De Manneville*, (10 Ves. 61), the doctrine laid down by his lordship does not go beyond acts clearly and grossly immoral or impious. "Since I have sat here," says his lordship, "I removed a child from its father upon considerations such as these: the father was a person in constant habits of drunkenness and blasphemy, poisoning the mind of the infant." And in the case of *Mitton* v. *Holyoake*, (see M'Pherson on Infancy, 149) the husband had not only treated his wife with cruelty, and his children with harshness, but introduced women of profligate character into his house, and taught the children to repeat and write blasphemous and irreligious language.

We believe there is no case to be found of the jurisdiction being exercised, in which the principles and conduct of the father were such as to admit at all of discussion, whether they were opposed to any settled rule of religion or morals; that is, to any rule so settled that a person contravening it would be obnoxious to the censures of the church, or to penalties imposed by the law. And if no such case is to be found, may it not be thought that the jurisdiction does not extend so far, bearing in mind the extreme delicacy of the jurisdiction, and the fearful authority with which it invests a judge, to interfere with a right of the most sacred and important character?

The remaining question is, whether, in *Thomas* v. *Roberts*, the principles and conduct of the father, as proved, were such as to be clearly irreligious or immoral, tried by any fixed and known rule.

Now, the charges against the father, made out by evidence, were three: first, the expulsion of his wife from his home and society, at a period when certainly such expulsion could not be viewed by any decent and sane man otherwise than as harsh and cruel treatment; secondly, the disuse of prayer in practice, and the professed belief of its being unnecessary and useless; thirdly, the professed and practical rejection of the seventh day as a day of worship and rest. We do not collect from the vice-chancellor's judgment that he rested it upon the first charge, however strongly he, with a just indignation, reprehended the conduct established by that charge. So that the only grounds on which, or on one of which, the judgment proceeds, are the two remaining charges. And taking the disuse of prayer first. It

must be recollected, that the Agapemonians did not say that generally prayer was useless, or that they had always neglected it. On the contrary, they said, that they had persisted in continual prayer until they had obtained that for which they prayed, viz. communion with God. They said, that having obtained that, they had ceased to use prayer, because it was no longer necessary to them, and they used instead hymns of praise and thanksgiving. Now, the English of all this is, that, according to their own statements, they believe themselves to be what, in the language of some other sects, is termed, "the elect," "the Lord's chosen," or the like; that is, persons having secured their salvation, and having therefore nothing more to pray for; and persons so believing, may be, perhaps justly thought, persons of wonderful conceit and folly; but are they clearly guilty of impiety? Do their belief and practice amount to more than this, that they err in their estimate of their own religious perfection? And does any amount of such error constitute impiety or blasphemy, in the sense usually or legally attached to those words?

Passing to the second head, that of neglect of the seventh day. Now, on this point, the Agapemonians also qualify their doctrine; they deny that they do not hold the seventh day holy, for they say that they hold every day holy, and devote every day to the Lord. So, at least, we construe their somewhat obscure expression of regarding "each day unto the Lord." And though it may be a very wrong construction of the fourth commandment, and of the practice of the Christian church, to hold the six days holy, as well as the seventh, does it amount to anything more, bearing in mind that it was not proved, or even alleged, that the Agapemonians do on the seventh day the only thing that is forbidden by the fourth commandment, viz. work; but only that they use certain sports on the seventh and on every other day indifferently?

Looking at the conduct of the Agapemonians, with reference to the test which we find, as we conceive, tacitly applied in the older authorities, could they be subjected, on account of it, according to the actual practice of the Courts, to any pains, penalties, or damages, in either a court of law or a court christian?

The Agapemonians may be very foolish fanatics, and the father, in the case of *Thomas* v. *Roberts*, may, in addition, deserve the censure of every man of decent feeling for his treatment of his wife; but, we confess, it does appear to us, that the exercise of the jurisdiction in this case introduces a principle not apparent in the authorities; making it exercisable in cases where the question of impiety or immorality may be one of opinion, instead of confining it to cases where the immorality or irreligion can be tested by some such positive rule as liability in practice to the judicial censures of the Ecclesiastical Courts, or to penalties or damages sustainable at law. — *London Jurist.*

Negligence — Agency. We notice in the Digest supplementary to the London Jurist, the following abstract of a case recently decided in the English Court of Common Pleas. It seems to be rather a strong case,

and we are not informed as to the grounds upon which the Court proceeded.

"A passenger in a public conveyance, injured by the negligent management of another conveyance, cannot maintain an action against the owner of the latter, if the driver of the former, by the exercise of proper care and skill, might have avoided the accident which caused the injury." *Thoroughgood* v. *Bryan*, 18 Law Journal, 336.

EQUITY JURISDICTION — RAILWAY COMPANY. The Master of the Rolls has recently interposed the restraining influence of his Court under somewhat novel circumstances.[1] A shareholder in a railway company which had been incorporated to construct a railway from Epsom to Portsmouth, filed a bill alleging that the directors were engaged in making the line from Epsom to Leatherhead, which was only a part of the proposed route, and praying for an injunction against them on the ground that the application of the funds of the company to the construction of a part only of the line was illegal. The bill was demurred to for want of equity, but the demurrer was overruled. See *Mayor of Kings Lyme* v. *Pemberton*, (1 Swanst. 244); *Salmon* v. *Randall*, (3 My. & Cr. 439); *Blackmore* v. *Glamorgan Can. Co.* (1 My. & K.); *Lee* v. *Milner*, (2 Mee. & W. 824); *Reg.* v. *East. Counties' Railway Co.* (10 Adol. & Ell. 531.)

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Cady, Jos. B.	Chicopee,	May 27,	Geo. B. Morris.
Cloyes, Francis	Worcester,	" 4,	Henry Chapin.
Dickson, Shadrach	Somerville,	" 24,	John M. Williams.
Fernald, Joshua E.	Boston,	" 4,	John M. Williams.
Fiske, Benjamin W.	Boston,	" 7,	John M. Williams.
Fitch, George C.	Hatfield,	" 14,	M. Lawrence.
Goodman, Henry A., et al.	Becket,	" 17,	Thos. Robinson.
French, Harvey	Quincy,	" 17,	Francis Hilliard.
Hall, Lott	Ashfield,	" 31,	D. W. Alvord.
Hedrick, Uriah	Boston,	" 17,	John M. Williams.
Hilliard, Ephraim M.	Lowell,	" 21,	Asa F. Lawrence.
Keith, James	Randolph,	" 1,	Francis Hilliard.
Leeke, James, Jr.	Cambridge,	" 29,	Asa F. Lawrence.
Moore, Jacob F.	Boston,	" 13,	John M. Williams.
Pratt, William L.	Worcester,	" 15,	Henry Chapin.
Putney, Leonard	Boston,	" 16,	John M. Williams.
Robbins, Henry S.	Greenfield,	" 17,	D. W. Alvord.
Russell, Benjamin F.	Springfield,	" 20,	Geo. B. Morris.
Stearns, Aaron S.	Whately,	" 30,	D. W. Alvord.
Shaw, Melvin	Abington,	" 20,	Welcome Young.
Shirley, Samuel S.	Greenfield,	" 31,	D. W. Alvord.
Thayer Lewis B.	Randolph,	" 21,	Francis Hilliard.
Thompson, Joshua E.	Grafton,	" 24,	Henry Chapin.
Townsend, Augustus	Waltham,	" 24,	Asa F. Lawrence.
Tryon, Ansel S., et al.	Pittsfield,	" 20,	Thos. Robinson.
Washburn, Albert	Braintree,	" 2,	Francis Hilliard.
Welles, Miles D.	Otis,	" 30,	Thos. Robinson.
Winter, Dexter S. K.	Worcester,	" 9,	Henry Chapin.
Winter, Waldo	West Boylston,	" 9,	Henry Chapin.
Woodman, James	Dorchester,	" 9,	Francis Hilliard.

[1] *Cohen* v. *Wilkinson*, 18 Law J. 378, 411.